Supreme Court, U.S.
FILED
JAN 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-843

In the Supreme Court of the United States

OCTOBER TERM 1985

THOMAS PAUL LONG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner contends that he was denied effective assistance of counsel because his trial attorney labored under a conflict of interest.

1. Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on two counts of attempted tax evasion, in violation of 26 U.S.C. 7201, and on four counts of making and subscribing false tax returns, in violation of 26 U.S.C. 7206(1). He was sentenced to concurrent terms of three years' imprisonment on each count. The court of appeals affirmed by judgment order (Pet. App. A1).

Petitioner was the president and sole shareholder of T. P. Long Chemical, Inc. In 1977, petitioner developed a scheme by which he attempted to conceal over $213,000 in corporate income during the years 1977 to 1979. As part of that

scheme, he instructed his bookkeeper, Matilda Montoni, not to record certain sales and receipts in the corporate sales journal and to deliver the checks for those receipts directly to him (Tr. 100-101, 158-167).[1]

Montoni's testimony was corroborated by the company's general manager, Bruce Bowers. Petitioner admitted to Bowers that he had taken out of the corporation about $200,000 more than his reported salary by personally cashing checks on unrecorded sales (Tr. 81-82).[2] Petitioner also revealed his scheme to two individuals who were interested in purchasing the company (Tr. 400-410, 440). To support his asking price, petitioner told the prospective buyers that the books substantially understated the corporation's true income, in part due to a large number of unrecorded sales (Tr. 406-408, 440-443).

2. Petitioner contends (Pet. 9-17) that he was denied effective assistance of counsel because his trial attorney labored under an actual conflict of interest. The court of appeals correctly rejected this fact-bound claim in a judgment order that is of virtually no precedential value and presents no conflict with the decisions of other courts of appeals. Review by this Court therefore is not warranted.

This Court held in *Cuyler* v. *Sullivan*, 446 U.S. 335, 348, (1980), that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial

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[1]Trial transcript references are taken from the government's brief in the court of appeals.

[2]Petitioner also informed Bowers that he would receive his bonus in the same fashion as had the previous manager; upon handing him a bonus check in October 1978, petitioner stated, "[h]ere is one of my famous checks * * *. Now, you are part of the conspiracy" (Tr. 118-120). In addition, petitioner rejected Bowers' attempt to hire an accounting firm to improve the bookkeeping system, on the ground that the present system was ideal for hiding income (Tr. 104-106).

must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." No such conflict existed here. Martin, petitioner's accountant and the preparer of his tax return, had been represented during the IRS investigation and at a pre-trial conference by petitioner's trial attorney, John Lynch (Tr. 3-4). At trial, the Government called Martin to explain his procedures in preparing petitioner's tax returns (Tr. 451-478). Martin was no longer represented by Lynch, and he made no attempt to invoke his attorney-client privilege on cross-examination (Tr. 5-10, 450-455). Compare *United States* v. *Cunningham*, 672 F.2d 1064, 1072 (2d Cir. 1982), cert. denied, No. 83-1543 (Apr. 23, 1984); *Theodore* v. *New Hampshire*, 614 F.2d 817 (1st Cir. 1980), *United States* v. *Jeffers*, 520 F.2d 1256, 1264-1266; (7th Cir. 1975), cert. denied, 423 U.S. 1066 (1976). Moreover, Martin was called by the defense to give detailed fact and expert testimony (Tr. 976-1098). In that capacity, Martin supported petitioner's defense that the diverted corporate receipts were actually "loans" that petitioner later repaid to the corporation (Tr. 916-919, 980-989; DX 000). Martin also challenged the Government's contention that petitioner had additional taxable income, and he confessed his own "error" in reporting additional taxable income on petitioner's amended tax returns (Tr. 1003-1004). Similarly, Martin catalogued numerous deductions that he claimed were omitted from petitioner's personal tax returns due to sloppy bookkeeping and that would offset any unreported income (Tr. 991-1001, 1009-1010). Finally, he personally took the blame for not reporting income on a number of petitioner's transactions (DX JJJ to PPP; Tr. 991-1004, 1008). In short, no conflict existed because Martin's testimony fully supported petitioner's theory of the defense.

The record also establishes that petitioner was fully aware of any possible conflict of interest arising out of his attorney's prior representation of Martin (Pet. App.

A10-A16). At the outset of trial, both the district court and the Assistant United States Attorney advised petitioner of the possible conflict of interest and how it might affect counsel's performance (*id.* at A10-A15). Petitioner acknowledged that he understood the situation, and he expressed his desire to continue with his counsel of choice (*id.* at A13-A16). In addition, Lynch stated that he had discussed the issue with petitioner and that neither of them believed a conflict existed (*id.* at A15). Accordingly, the record makes clear that petitioner knowingly and voluntarily waived any conflict that might have existed, and it refutes petitioner's contention (Pet. 15-16) that the district court did not adequately explore the possibility of a conflict of interest.

With respect to bookkeeper Montoni, the record discloses that Lynch had neither a significant attorney-client relationship with her nor any conflict of interest stemming from his representation of her at an Internal Revenue Service interview (Tr. 181-182). In fact, petitioner arranged for Lynch's appearance with Montoni at that interview and offered to pay the fee (Tr. 892-895). Furthermore, counsel's cross-examination of Montoni was guided by considerations of trial strategy and was as vigorous as the evidence would permit. Counsel attempted to elicit testimony minimizing petitioner's involvement with invoices and checks while he was out of the office (Tr. 183-190), and counsel highlighted the details of Montoni's prior false statements to the Internal Revenue Service and explored the possibility that her testimony was motivated by her own fear of prosecution (Tr. 190-192).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1986